V. POTENTIAL HARMS AND BENEFITS IN THE PROVISION OF MVPD AND BROADBAND SERVICES

97. In this section we analyze the potential harms and benefits of the proposed merger on competition in the relevant product markets that include DBS and satellite Internet access services. In general, competition depends on consumers having choices between products that are fairly good substitutes for each other. If consumers have such choices, a single provider cannot raise its prices above the "competitive" level because consumers will switch to a substitute. The level of competition depends on what products are substitutes (product marker), where these substitute products are available (geographic market), what firms produce them (market participants), and what other firms might be able to produce substitutes if the price were to rise (market entry). To evaluate the impact of a merger on competition, we examine the characteristics of competition in the markets of the merging firms and determine the impact of the merger on these characteristics. Mergers raise competitive concerns when they reduce the availability of substitute choices (market concentration) to the point that the merged firm has a significant incentive and ability to engage in anticompetitive actions (such as raising prices or reducing output) either by itself, or in coordination with other firms. Economic theory describes both how such anticompetitive actions can harm consumers and how the magnitude of the harm can be measured.

98. In Section A. we review existing antitrust precedent concerning mergers that significantly increase concentration in relevant markets. The decisions suggest that a merger that reduces the number of competitors to two or one would generally be found IO violate the antitrust laws, regardless of any potential benefits it might confer. Section B then considers the possible anticompetitive effects that might result from the proposed combination of EchoStar and DirecTV in the relevant market that includes DBS. We first perform a structural analysis considering the relevant product and geographic markets, identifying the marker participants, and then examining various structural factors that affect the likelihood of competitive harms. Because our structural analysis suggests that the merger is likely to result in substantial anticompetitive effects, we next examine how the merger is likely to affect competitive behavior. We consider both whether the merger is likely to lessen competition through unilateral actions by the merged entity or through coordinated interaction among market participants. Section C addresses the potential benefits that may result from the merger, including possible cognizable efficiencies. We consider whether the Applicants have sufficiently documented their claimed efficiencies or whether they are merely speculative, and whether the cost savings will likely **pass** through to consumers. Finally, in Section D examines the Applicants' claims regarding potential benefits of the merger in the provision of satellite-based broadband services.

A. Relevant Antitrust Precedent

99. As discussed in greater detail below, this proposed transaction raises significant concern, because, for the vast majority of consumers. it would result in a reduction in the number of competitors from three to two or from two to one, depending on whether the consumer today has access to cable service. Such a drastic reduction in the number of competitors and concomitant increase in concentration create a strong presumption **of** significant anticompetitive effects.

100. As NAB observes, courts have generally condemned mergers that result in duopoly, and have been even more hostile to those that result in monopoly.[304] In *FTC v. H.J. Heinz Co.*, for example, the United States Court of Appeals for the District of Columbia Circuit, reversing a district court's denial of the government's request for a preliminary injunction, rejected the district court's finding that the merger of the second and third largest firms in a three-firm baby-food market would increase the ability

[304] NAB Petition at 64-70.

processing rounds, the Commission determined that a waiver of these rules was in the public interest and would not undermine the policy objectives of the rules.[299] In the first Ka-band processing round, the Commission waived application of the rules because it found that the applicants had agreed to an arrangement that accommodated all pending applications for space stations, and left room for additional assignments.[300] In the second Ka-band processing round, the Commission determined that because the assignment plan it developed could accommodate all pending requests for space stations, with room for additional entry, it would again waive application of the rules."[301] Particular emphasis was placed on the benefits of not applying the rules in these initial assignments because application of the rules would have neither promoted geographic diversity nor increased the number of suppliers in the market?[302]

95. In our recent order to update and reflect revisions to the Ka-band assignment plan, we noted that a number of orbital locations remain available for additional entry by other Ka-band applicants.[303] The availability of sufficient orbital locations was one of the key facts that justified our waiver in the first and second Ka-band assignment rounds. We also note that there are a number of potential providers that have been assigned orbital locations capable of providing service to geographically dispersed areas. Thus, the circumstances that justified a waiver in the first and second Ka-processing rounds may also justify a waiver of the Sections 25.140(e) and (f) to accommodate this proposed transaction. As no request for waiver is before us at the present time, and in light of the procedural posture of this case, we make no conclusive determination under Sections 25.140 (e) and (f) at the present time.

96. In summary. we find that the proposed transaction is not consistent with this Commission's long-standing spectrum policies, the bulk of which have been aimed at creating competitive spectrum-based communications services within and among the voice, video and data services markets. We have consistently found that from the perspective of spectrum policy, the public interest is better served by the existence of a diversity of service providers wherever possible. Today we have such diversity in the DBS service, and Applicants have presented no compelling reason, from a spectrum policy standpoint, why we should approve license transfers that would effectively replace facilities-based intramodal DBS service competition with a monopoly on full-CONUS DBS licenses. This is particularly true given our assessment of the likely significant competitive harms the merger poses to the MVPD market. We will take account of this inconsistency with the Commission's pro-competitive spectrum policy in our balancing of the potential public interest harms and benefits of the proposed transaction

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[299] Section 1.3 of the Commission rules provides ihat waivers may be granted when good cause is shown. ***See*** 47 C.F.R. § 1.3. According to criteria delineated by the Court of Appeals a waiver *is* appropriate only when it is found in light of special circumstances presented in the case at hand that granting such relief would not undermine the underlying purpose of the rule requirement in question and would better serve the public interest than insisting on strict compliance. ***See WAIT Radio v. FCC,*** 418 F.2d 1153, 1157 (D.C. Cir. 1969), ***cerr. denied,*** 409 **U.S.** 1027 (1972): ***Norrheast Cellular Telephone*** Co.. ***L.P.*** v. *FCC.* 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[300] ***Rulemaking*** to ***Amend parrs*** *1,* 2, *21, and 25* of ***the*** *Commission's* ***Rules*** *to* ***Redesignate rhe*** *27.5-29.5 GHz* ***Frequency Band, to Reallocare*** the *29.5-30.0 GHz* ***Frequency Band. to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Sarellire Services,*** Third Report and Order, I2 FCC Rcd 22310. 22320 (1997) (*"Ka-Band Rules* ***Order"***).

[301] ***See Ka-Band Assignment Orders,*** n.28, ***supra***

[302] *See Id.* The International Bureau noted that impending ITU deadlines for operating satellites at the available Ka-band orbit locations would be difficult to meet if further processing rounds were required for assigning new applications to extra orbital locations.

[303] ***See Id.***

93. With respect to claims by some parties that the proposed merger would violate the Commission's policies against the warehousing of spectrum and orbital slots, we find that it is not appropriate, in this proceeding, to make such a determination at this time. The milestone schedules, which are included as pan of each Ka-band authorization. are designed to ensure that licensees will proceed with construction and launch of their satellites in a timely manner, and that the orbit location and spectrum resources are not held by licensees unable or unwilling to proceed with their plans.'" In addition. the Ka-band milestones were designed to meet critical 'bring-into-use' dates which the United States committed to under the International Telecommunications Union's ("ITU") coordination procedures.[294] While there are claims on the record in this proceeding suggesting the possibility that future milestone requirements would not be met by New EchoStar, resulting in potential warehousing of scarce Ka-band spectrum resources. we find these claims are premature.[295] The Commission has in place a separate milestone review process which it undertakes of each authorization to verify that the licensee is committed to proceeding with implementation of its proposal. Because it is in the public interest to protect against warehousing of scarce spectrum resources and to ensure that scarce spectrum resources are being used efficiently. we strictly enforce these milestone requirements.'" **Our** strict enforcement policy will be employed in each Ka-band authorization milestone review – regardless of whether. in this case, the companies proceed as a new merged entity or separately – where a complete and full record can be developed to more appropriately and timely address these issues.

94. Finally, we address Opponents' arguments that the proposed merger should be denied because it would violate Sections 25.140 (e) and (f) of our rules. These rules place limits on the number of orbit locations that a qualified FSS applicant may be assigned initially for a new system and for expanding a previously licensed system using the same frequency bands.[297] The rules were designed to avoid prematurely assigning an excessive number of orbit locations to an existing licensee for expansion of its domestic system, and to promote entry opponunity in the bands.[298] In the first and second Ka-band

[293] Requiring licensees to adhere strictly to **a** milestone schedule prevents orbital locations from being warehoused by licensees to the exclusion of qualified entities that arc prepared to implement systems immediately, and ensures that the scarce orbit spectrum resource is being used efficiently. **See.** *e.g.*, ***MCI Communications Corporation***, 2 FCC Rcd 233 (Common Carrier Bur. 1987); *Advanced* ***Communications Corporarion,*** 10 FCC Rcd 13337 (Int'l Bur. 1995) ("ACC Order"); *Morning Star* ***Satellite Company*** *LLC.* 15 FCC Rcd I1350 (Int'l Bur. 2000) *aff'd*, 16 FCC Rcd 11550 (2001) ***("Morning Star Order").*** ***See*** *also* ***Norris Satellite Communications, Inc.***, 12 FCC Rcd 22299 (Int'l Bur. 1997).

[294] Failure to meet the ITU 'bring-into-use' date would result in the loss of U.S. priority in that orbital location, thus. allowing other countries to obtain coordination "priority" at that location. ***See. Ka-Band Assignnienr Orders,*** n.28, ***supra.***

[295] *See e.g.* Pegasus Petition at 72-73. If New EchoStar failed to meet the milestones for its Ka-band authorized satellite systems, the orbital locations associated with these milestones could be reassigned by the Commission to **a** new licensee. The new licensee, however, would be subject to the existing ITU "bring-into-use" date. The amount of time involved in such a re-assignment process makes it unlikely that any new licensee could meet the current ITU dates. thus, resulting in the loss of U.S. ITU coordination priority at these orbital locations.

[296] ***Morning Star Order,*** n.292, ***supra.***

[297] *See* 47 C.F.R. § 25.140(e), (f).

[298] The rule was originally adopted in 1983 based on a 1980 Orbit Assignment Order. In 1983. given *the* **newness** of the satellite industry, the Commission was concerned about allowing any one company to acquire too many satellite licenses in the absence of any demonstrated demand for satellite traffic. According to the Commission, "... two orbital locations were reasonable under the circumstances and more than sufficient to establish a reasonably competitive market presence when the satellite operator had little or no firmly demonstrated traffic commitments." ***Rulemaking*** *on* ***rhe Licensing of Space Stations*** *in the* ***Domestic Fixed-Sarellire Service and Related Revisions*** *of* ***Part 25 ofrhe Rules ond Regulations***, CC Docket No. 81-704, Report and Order, **54** RR 2d 577 (1983). ***See*** *also* ***Licensing Space Srorions*** *in* ***rhe Domestic Fixed-Satellite Service,*** 50 Fed. Reg 36071 (Sept. 5, 1985).

satellites located in all the full-CONUS orbital positions would be appropriate.[288] In this case, the record indicates that allowing one satellite company to control all current U.S. allotted full-CONUS DBS orbital locations is not consistent with the public interest. The record demonstrates that significant benefits in the MVPD market have been brought about by the competition between EchoStar and DirecTV in all portions of the United States. The record also shows that consolidating all full-CONUS DBS spectrum with one provider would likely eliminate these benefits to the detriment of consumers. without providing adequate off-setting public interest benefits. Thus, we do not find the proposed transaction to be consistent with our long-standing policies that have brought about competition in the provision of DBS service, as well as competition between DBS and cable service.

92. Based on the record before us, we believe the proposed merger may be inconsistent with other long-standing Commission spectrum assignment and allocation policies as well. For instance, when establishing requirements for assignments and allocations of spectrum for use in a particular satellite service. our decisions are generally guided by a policy that promotes optimal use of spectrum for entry by multiple service providers.[289] In establishing requirements for operating in the Ka-band, we adopted a band segmentation plan that we found would "promote[s] spectrum efficiency and facilitate[s] the deployment of diverse, interactive, competitive services for consumers."[290] Numerous applications have been received and authorized by rhe Commission, including applications from each of the Applicants, proposing Ka-band satellite systems that have the "potential to provide a wide variety of broadband interactive, direct-to-home. and digital services to all areas of the United States, including under-served and rural areas."[291] The Applicants now claim in this proceeding that the combination of all full-CONUS DBS frequencies with the combined Ka-band frequencies and other spectrum resources that would result if the proposed merger is approved is necessary to produce a more competitive market place for broadband services.[292] As we discuss *infra,* the record before us fails to support the Applicants' claim. Instead, the record raises concerns that the proposed merger would concentrate these substantial spectrum resources in one entity, resulting in disproportionate power in both the U.S. MVPD and satellite broadband markets to the disadvantage of consumers. We do nor believe that such concentration of spectrum resources is necessary to create a competitive satellite-based broadband service, and as proposed, appears contrary to our spectrum assignment policies.

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[288] *Id.*

[289] *See, I597* ***DARS Order,*** 12 FCC Rcd at *5786.* In the DARS proceedings, our review noted that "[w]hile we are nor sure of the optimal amount of spectrum necessary for satellite DARS. it is our goal to try to determine spectrum block sizes and geographic areas that are most closely suited to provide for efficient provision of the most likely expected use. In this case. because this is a satellite service, the license areas should be nationwide and we have evaluated the evidence about the minimum spectrum block sizes necessary to economically provide satellite DARS. We begin our analysis of determining how much spectrum a single satellite DARS provider will require by considering what the record reveals about how many channels are necessary to operate an economically viable satellite DARS system."

[290] ***See e.g., Rulemaking to Amend parrs*** I, ***2, 21, and 25*** of ***rhe Commission's Rules to Redesignare the 27.5-29.5 GHz Frequency Band,*** *to* ***Reallocare rhe 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services,*** Third Report and Order, 12 FCC Rcd ***22310*** (1997) ***("Ka-Band*** Rules ***Order").***

[191] ***See e.g. Ka-Band Assignment Orders,*** **n.28,** ***supra.***

[292] While the Applicants now assen that neither of the company's stand-alone Ka-band satellite systems would result in timely deployment of affordable satellite broadband services **to** residential customers. the record indicates that it **is** more likely the current economic climate. and not spectrum constraints. that would prevent such deployment. ***See*** *e.g.,* Applicanrs' Reply Comments at **96**-101.

facilities-based DBS providers, both with roughly balanced DBS spectrum resources, has resulted in significant consumer benefits, including increased satellite-delivered programming and services, competitive prices, innovative advanced technologies and improvements in overall quality of service to consumers.

90. We have recently taken additional steps to promote intermodal competition in the ***2002 DBS Reporr and Order***.[283] In that proceeding. we adopted a number of streamlining measures and other rule changes designed to facilitate the ability for DBS to become a more competitive service.?" For instance. our decision relaxed the rule for non-conforming use of DBS spectrum at all DBS orbital locations.[285] We found that, consistent with our spectrum management policies, a flexible use policy would promote greater spectrum efficiency by allowing DBS operators to determine specific services to be offered and would enable DBS operators to better compete with MVPD providers who have no similar restrictions.[286] We believe the adoption of the flexible use policy will result in efficiencies that are conducive to the public benefit. We disagree with Applicants' claim that only by combining all full-CONUS DBS frequencies in a single provider would spectrum efficiencies be gained to the benefit of customers. The recent reforms to our DBS rules and policies were intended to accelerate competition in the MVPD market and provide DBS providers with appropriate flexibility to compete in the MVPD market in a manner that benefits consumers. These changes are only now being implemented and their impact is not yet known. We believe, however, that these measures will achieve our stated goals of a competitive DBS service without the risks to competition. discussed more fully below, that are associated with consolidating all full-CONUS DBS spectrum with one service provider.

91. In the 2002 ***DBS Reporr and Order,*** we addressed the issue of whether any ownership restrictions on DBS licensees were necessary to promote our goal of full and fair competition in the MVPD market and our goal of spectrum efficiency.[287] Although we found that ***per se*** restrictions on the number of full-CONUS orbital locations that one satellite company can control were not necessary, we specifically left open for consideration, on a case-by-case basis, whether ownership by one entity of all

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would increase both companies' channel capacity, which was necessary for DBS operators to remain competitive, particularly with cable operators, in the MVPD market. ***See Tempo- DirecTV***, 14 FCC Rcd at 7955. In none of these cases was it necessary for the Commission to analyze the competitive effects of a merper of the only two full-CONUS DBS providers. **As** the Commission recognized. the two **DBS** providers would compete with each other. and thus, the only relevant issue IO resolve was whether allowing each individual **DBS** competitor to become a stronger competitor against other providers in the MVPD market would be in the public interest. *Tempo - DirecTV*, 14 FCC Rcd at 7955.

[283] ***See*** *2002 DBS Reporr and Order,* n.16, ***supra.***

[284] ***Id.*** The Commission revised its rules and policies governing DBS service by, ***inter alia.*** incorporating its **DBS** service rules (Part 100) into other satellite service rules (Part *25)* to eliminate inconsistencies, reduce confusion and uncertainty for users, lessen regulatory burdens on licensees, and simplify the development of advanced services. *Id.* at 11341-43. The Commission took these steps in an effort to promote competition in the **MVPD** market and thereby benefit the public by maximizing consumer choice, **as** well **as** better quality of service to the public, and to promote efficient and expeditious use of spectrum and orbital resources while maximizing flexibility for DBS operators. ***Id.*** a! 11322.

[285] ***See*** *2002* ***DES Reporr and Order,*** n.16 ***supra*** at 11399-11402.

[286] *Id.* at 11400. 11401-02. Our flexible use policy allows DBS operators to provide enhanced services including data access and high-speed Internet access using downlink frequencies (*i.e.* from the DBS operator to the customer). We did not adopt, however, the same flexibility with respect to the use of uplink frequencies (*i.e.*, from **the** customer to the DBS provider). *Id.* at ¶ 11402.

[287] ***See Id.*** **at** 11332, 11398-99.

licensing of two systems for every cellular service area would best serve the public interest as it would "foster important public benefits of diversity of technology. service and price, which should not be sacrificed absent some compelling reason."[275] Consistent with this policy. the Commission determined that a competitive market was also the best way to introduce personal communication services ("PCS") to the public and adopted various measures to ensure that PCS licenses would be disseminated to a wide variety of applicants.[276] Later, the Commission took actions to further its competitive policies by establishing a spectrum cap for CMRS.[277] In doing so, the Commission found that such action would promote pro-competitive ends in the CMRS markets and "discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency."[278] The initiatives adopted by the Commission in the CMRS markets have resulted in a strong growth of competition in those markets. leading to the Commission's recent action to sunset the spectrum cap rule, and rely instead on case-by-case analysis of the competitive effects of particular transactions to protect the public interest.[279]

89. The Commission has also employed measures to ensure competition in the provision of DBS service. For instance, in the DBS spectrum auction in 1995, the Commission limited applicants to having an attributable interest in no more than one full-CONUS orbital location."' The Commission recognized that reducing concentration of full-CONUS DBS resources would promote competition and thereby benefit the public. Thus, the Commission implemented a one-time auction rule to ensure that each of the three full-CONUS DBS orbital locations would initially be controlled by entities that did not share interests with DBS operators at the other two orbital locations, and thus, permit rhe development of fully competitive DBS services.[281] Since that time, the Commission has carefully considered changes in DBS ownership, and has fashioned an approach which has resulted in no fewer than two DBS licensees to operate in the full-CONUS DBS spectrum.[282] Under this approach, competition between the two licensed

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"'See *An Inquiry Into rhe Use* ojrhe *Bands 825-845 MH; arid 870-890 MHz for Cellular Communications Systems; and Amendment of Parrs 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, Report and Order, 86 FCC 2d 469, 476, 478 (1981).

[276] *See Amendment of the Commission's Rules to Establish New Personal Communications Services,* 9 FCC Rcd 4957 (1994). The Commission stated that its actions were designed "to enable PCS providers to compete effectively with each other and with other wireless providers so that the American public can enjoy the greatest benefit from the delivery of these new services." *Id.* at 4960.

[271] *Implementation of Sections 3(n) and 332 of the Communications Acr, Regulatory Treatment of Mobile Services. Third Report and Order, 9* FCC Rcd 7988, 8100.01 (1991). To ensure that competition would shape the development of the CMRS market, the Commission look a number of steps. including adoption of a rule lo cap at 45 MHz the total amount of cumbined broadband PCS. cellular, and Specialized Mobile Radio (SMR) spectrum in which an entity may have an attributable interest in any geographic area. *Id.* at 7995.

[278] *Id.* at 8105, 8100.

[279] See *2000 Regularon Review of Spectrum Aggregation Limits for Commercial Mobile Radio Services,* Report and Order. FCC 01-328, 61 Fed Reg 1626 *("CMRS 2000 Biennial Review").* The Commission found that the spectrum cap had achieved its purpose as consumers have realized the benefits of competition in the form of increased output, lower prices. and increased diversity of service offerings. *Id.* at ¶ 35. Thus, the Commission has determined to replace spectrum caps with other regulatory mechanrsms, including case-by-case review of spectrum aggregation and enforcement of other safeguards applicable to such carriers hased on evidence of misconduct. to ensure that absent the spectrum cap, the benefits of competition in CMRS markets continue to he realized. *Id. at ¶ 6.*

[280] *See 1995 DBS Report and Order,* 11 FCC Rcd at 9723.

[281] *id.*

[282] In April and May of 1999. the Commission issued three decisions that resulted in placing all current U.S. allotted full-CONUS DBS authorizations under the control of two DBS operators: *USSB–DirecTV; MCI–EchoStar;* and *Tempo–DirecTV,* n.39, 40. *supra.*. In doing so. the Commission recognized that such consolidation would improve the ability of the DBS operators to compete in the MVPD market stating that additional full-CONUS spectrum

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market definition, but on competition available in the entire market.[267] In this respect, Applicants contend that the proposed merger would not preclude other companies from opportunities to use satellite spectrum and orbital locations, as well as other technologies, to introduce competition in the MVPD market.[268]

86. Further. the Applicants claim that the proposed merger is necessary to create a "true" competitive broadband service alternative.[269] The Applicants assert that approval of the proposed merger will not result in spectrum warehousing or in precluding additional entrants from providing high-speed and advanced services,'" but rather will help fulfill several of the Commission's stated broadband principles and policy goals.'" The Applicants claim that II other entities not affiliated with either EchoStar or Hughes have Ka-band authorizations for orbital locations capable of serving all CONUS locations, and contend that this demonstrates that there are more than enough prime Ka-band slots controlled by others to ensure that the merger will not stifle comperition in providing broadband services.[272] Finally, the Applicants assen that the Commission has never applied Section 25.140(e) and (f) to a merger and has explicitly waived these rules with respect to the Ka-band license applications.[273] Thus, Applicants claim that the merger does not conflict with any Commission satellite orbital position rules or spectrum concentration policy.

b. Discussion

87. One of our foremost concerns in reviewing the proposed merger is the impact that concentration of 100% of the current U.S. allotted full-CONUS DBS spectrum in a single company would have on competition in the overall MVPD marker and on our spectrum policies generally. As we discuss elsewhere in this Order, based on the record before us, we have concerns that permitting these two DBS competitors to merge would have a negative impact on competition in the MVPD market to the ultimate detriment of consumers. As discussed below, we have further concerns that the proposed merger would run counter to well-established federal pro-competitive spectrum policies.

88. This Commission has a long-standing policy of promoting competition in the delivery of spectrum-based communications services and has implemented numerous measures to foster entry and ensure the availability of competitive choices in the provisioning of such services. For instance. in the DARS proceeding, the Commission established a licensing approach that provided for two DARS licensees because it determined that more than one DARS licensee was necessary "to ensure competitive rate,. diversity of programming voices, and other benefits of a competitive DARS environment."[274] Similarly, in the initial provisioning of the radio cellular service, the Commission determined that the

[267] The Applicants claim that the product market is the MVPD market, not three DBS slots, not even satellites only. *See* Applicants' Reply Comments at 32-33.

[268] *Id.* at 49. 109.

[269] *See Id.* at 81. Applicants contend that neither EchoStar nor Hughes alone could timely deploy an affordable satellite broadband service to consumers and that the merger is necessary to enable such timely deployment. *Id.* at 96.

[270] *Id.* at *50,* 109.

[211] *Id.* at *82.* For instance, Applicants claim approval of the proposed merger will encourage ubiquitous availability of broadband access to the Internet to all Americans, promote competition across different platforms. and ensure that broadband services exists in a minimal regulatory environment that promotes investment and innovation. *Id.*

[272] *Id.* at 109-110.

[273] *Id.* at 110.

[274] *See Establishment of the Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHZ Frequency Band,* 12 FCC Rcd 5754, 5786 (1997).

would allow an extraordinary Combination of scarce resources creating a monopoly in the provision of DBS service and eliminating substantial MPVD and satellite broadband competition throughout the country.[259]

84. Specifically, the merger Opponents argue that the Commission has never previously approved an action that led to a spectrum monopoly, and refer to a number of proceedings, such as the Commission's determination to license two Digital Audio Radio Satellite ("DARS") and the adoption of the Commercial Mobile Radio Services ("CMRS") spectrum caps, as examples where the Commission used spectrum policies to promote competition.[260] Opponents also assert that if the license transfers are granted, New EchoStar would control as much as one-third to one-half of the U.S. authorized Ka-band satellites capable of serving the CONUS.[261] The Opponents contend that this spectrum, along with all the full-CONUS DBS frequencies, and the substantial C-band and Ku-band FSS capacity that would be controlled by New EchoStar post-merger, would completely eliminate competition in the satellite broadband market.[262] The Applicants have not, according to the Opponents, demonstrated that all this capacity is necessary to offer a viable broadband satellite service[263] and that such results are clearly inconsistent with the Commission's policies against warehousing of spectrum and orbital slots[264] and in violation of Section 25.140(e) and (f) of the Commission rules.'"

85. The Applicants respond that the proposed merger is not contrary to Commission spectrum policies. Particularly, they claim the propoaed merger would allow for the elimination of duplicative use of the spectrum, clearly one of the Commission's key spectrum objectives.[266] They contend that the proposed merger will have pro-competitive, not anti-competitive, effects in the MVPD market and assen that the Commission's competitive analysis should not be based on a "band-by-band"

[259] *See e.g.*, Pegasus Petition ai 8.

[260] *See e.g.*, NAB Petition at 107-110; Sidak Decl. at 17-18; Pegasus Petition at 61-62. 66-67; Duke Law Reply Comments at 25.

[261] *See e.g.*, NTRC Petition at 52, NAB Petition at 103, Pegasus Petition at 70-71. Pegasus states that full CONUS coverage could be achieved from 62" W.L. to 135" W.L. and that of the total 35 orbital locations assigned in that range, 8 Ka-band orbital locations would be under the control of New EchoStar. as well as 3 Kn-band orbital locations thai are assigned to affiliatesof Wildblue Communications, in which EchoStar holds a 20% voting interest.

[262] See *e.g.*, NAB Petition ai 103, NRTC Petition at 50, Pegasus Petirion at *63*, 69-71.

[263] *See e.g.*, Pegasus Petition ai 72; NRTC Petition at 55; Duke Law Reply Comments at 23.

[264] *See e.g.*, Pegasus Petirion at 71; NRTC Petition at 52-53. *55;* Duke Law Reply Comments at 23. NTRC, for instance, assens that little progress hns been made by either EchoSiar or Hughes/PanAmSat in launching a Ka-band business. They point out that EchoStar and Hughes' announcements of delays in launching, failed plans of other Ka-band licensees, and the high capital costs required io build Ka-band saiellites, as acknowledged by both parties. raises substantial questions about whether all the Ka-band satellites will he constructed. Allowing the merger would aggravate the problem by tying up valuable orbital locations to the disadvantage of potential competitors.

[265] *See e.g.*, NAB Petition at 110; NRTC Petiiion at 52-53; Pegasus Petition at 71-72. The parties assert that the proposed merger would violate Sections 25.140(e) and (f) of the Commission rules which stare that applicants for FSS licenses may only initially be assigned two orbital locations in a frequency hand, and that an applicant with two authorized but unused orbital locations in a band may be assigned no more than one additional orbital position in that band. See 47 C.F.R. §§ 25.140(e) and (f). They claim that New EchoStar would obtain additional Ka-band orbital locations even though neither EchoStar nor Hughes has yet constructed and brought into operation previously authorized Ka-band satellites.

[266] *See* Application at 27; Applicants' Reply Comments at 30-31; Letter from Pantelis Michalopoulos, Esq. on behalf of EchoStar and Gary M. Epstein on behalf of Hughes to Marlene Dortch, Secretary. FCC (October 8, 2002) Vol I. Attachments 2, 5 (Applicants Oct. 8 ex *parte*).

compression ratios of 12:1 or better are feasible, we accept the Applicants' assertions that such video compression levels are not satisfactory today for all programming, particularly programming having a high degree of motion, such as sports.

80. It is also noteworthy that, under the Applicants' proposal. it would take a full three years to achieve the full efficiency improvements that would enable New EchoStar to expand local-into-local service to most areas. The record indicates that the great majority of television households will receive local-into-local service from both DirecTV and EchoStar within this timeframe even absent the merger. Therefore, any merger-specific benefits that the merger might produce with respect to local-into-local service would, at best. accrue to a small percentage of potential viewers. Funher, we have every reason to believe that technological advances that will increase the efficiency of DBS will continue to be developed as they have in the past. We simply do not know what specific techniques may become economically and technically feasible, and in what timeframes. In such a case, the gap between the expanded service that may be provided under the merger and what might be achieved through normal technological advances would not be significant. In any event. any expanded service offerings that may result from improvements in spectrum efficiency, such as increased carriage of HDTV and ITV services, must be weighed against the non-technical drawbacks of the merger, which include the elimination of an existing DBS provider in every market.

81. With regard to whether similar spectrum efficiencies might be achieved through a joint venture, we find that the Applicants have not demonstrated that this is technologically infeasible. The Applicants' criticisms of a joint venture are based largely on business issues. They present no immutable reason why these issues could not be addressed through appropriate business arrangements. As to the claimed benefit of increased service to Alaska and Hawaii, the Applicants have not demonstrated that the merger is necessary for this purpose. Finally, with regard to the Opponents' claim that Ka-band satellites could be used to provide DBS service, we find thar such claims are nor relevant because this use of frequencies would require new equipment for each subscriber irrespective of the merger. In addition. we do not expect that Ka-band satellites would be used for DBS service within the next two lo three years.

82. In sum, we find that the proposed merger would offer technical benefits in terms of improving the overall current efficiency of use of the DBS spectrum by eliminating carriage of duplicative channels of video programming, and that the increased spectrum efficiency would make available satellite system resources that could be used for other purposes. The central question whether the competitive structure that results from a combination of the only two full-CONUS DBS operators is likely to result in cognizable public interest benefits, such as reduced prices or the addition of new and innovative services, is analyzed in Section V.C. below.

2. Spectrum Policy Concerns

a. Positions of the Parties

83. As we noted above, approval of the proposed merger would place a significant amount of spectrum resources under the control of a single entity, most notably placing all the full-CONUS DBS authorizations under the control of the newly merged company. Several merger Opponents object to the proposed merger claiming that placing all of the U.S. assigned full-CONUS DBS orbital locations under the control of a single entity would violate Commission policy and rules on spectrum concentration and concentration of control of orbital positions.[258] They contend that the approval of the proposed merger

[258] See *e.g.*, NAB Petition ai 105-111; Pegasus Petition ai 63-68; Duke Law Reply Comments at 23. 25-26. See *also* NRTC Petition at 38-41, asserting ihe merger violates the Commission's long-standing policy to promote facilities-based competition as ii would eliminate facilities-based competition in the high-powered DBS market.

b. **Discussion**

77. There can be little doubt that the proposed merger offers technical benefits in terms of improving the overall current efficiency of use of the DBS spectrum by eliminating carriage of duplicative video programming. It also is evident that increased spectrum efficiency would make available satellite system resources that could be used for other purposes. **For** example, the resource savings could be used to offer local-into-local service **on** a broader scale **to** a greater number of DMAs. increase the diversity ***of*** program offerings, or implement advanced services such as HDTV.

78. We agree. however, with the Opponents that even absent the merger, it is reasonable to assume that each company would likely offer local-into-local broadcasting service to **at** least **80** to 100 DMAs within the next one to two years based on the new and planned satellites that will soon go into service. **As** the Opponents point out, the latest satellites offer significant improvements in spectrum efficiency through use of spot beams.[255] These new satellites effectively double the capacity to offer local channels for each company. Therefore, given that EchoStar and DirecTV each currently provide local service to approximately **40** markets, we believe it is reasonable to anticipate that. without the merger, company would be able to offer local broadcasting service **to 80** to 100 DMAs within the next one to two years. This would permit the Applicants to serve about 80-85% of TV households with local-into-local service without the merger.[256]

79. The technical improvements that would be required for each company to offer local-into-local broadcast television service to the remaining 15-20 percent **of** TV households (in the unserved **130** to 110 DMAs) and expansion of service offerings such as HDTV to these customers are extensive and more difficult to predict. The Opponents' arguments that each company could provide service to all or close to 210 DMAs are based largely on anticipated technological advances or very aggressive use of currently developed technologies. For example, some Opponents argue that it **is** now feasible to use spot beam satellites that re-use spectrum much more intensively than the satellites currently used or planned by the Applicants.[257] We agree with the Applicants. however, that the spot beam satellites on which the Opponents base their claims may not be technically and economically viable at this time. We also find that the Applicants have raised legitimate technical issues relative to a possible shift to more efficient modulation techniques, such as the availability of satellite on-board processing and adequate power, as well as interference concerns. In addition, changes **in** the modulation methods would require replacement of existing subscriber set-top boxes and it is not clear that each company **on** a stand-alone basis would have an economic incentive to make such an extensive change, all other factors being equal. This is not to say that these technologies would not be economically feasible today in a "greenfield" application where equipment replacement is not required. While the Opponents claim that improved video

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[255] We note that DirecTV recently deployed DIRECTV-4S, which uses ***26*** spot beams with 6 transponders. Further. in 2003 DirecTV plans to launch DIRECTV-7S, which apparently will have characteristics similar to DIRECTV-4S. EchoStar recently deployed ECHOSTAR-7S, which uses ***5*** **spot** beams. Further, EchoStar recently successfully launched ECHOSTAR-8S, but that satellite is nor yet in service.

See "Nielsen Media Research Local Universe Estimates:" http://www.nielsenmedia.comlDMAs.html. We note that some relatively large DMAs are not served by both DirecTV and EchoStar. For example, EchoStar does not serve the Baltimore DMA. which ranks 24th in the number of TV households. ***See*** *wysiwyg://20/http://www.dishnetwork.com/content/programming/locals/index.shtml*

[257] Mr. Morgan, for NRTC, contends that both EchoStar and DirecTV could increase capacity sufficiently to serve lite using 46 to 50 spot beams with a frequency reuse of 17:1 for EchoStar and 15:l for DirecTV We observe that this is nearly twice as many spot beams as are used **on** the current generation **of** DBS **spot** beam satellites. For example, DIRECTV-4S and DIRECTV-7S each use 26 *spot* **beams** and ECHOSTAR-8S uses ***25*** spot beams. **All of** the existing rpot beam satellites achieve frequency reuse between approximately 5:1 **and** 10:1

75. The Applicants state that without the merger, DirecTV will be able to serve approximately 70 DMAs and EchoStar will be able to serve 50 DMAs.[246] The Applicants also state that the Opponents ignore the economic realities in assessing how many DMAs each company could serve individually and they reiterate that absent the merger, expanding local service into all 210 DMAs would not be profitable.[247] Satellite companies must assess "the net present value of adding local channels, and only decide to expand local channel coverage that will bring them a sufficient return."[248] The Applicants state that the ability to increase revenue decreases as the size of the DMA decreases."' and argue that the Opponents have not factored in such things as the opportunity cost of forgoing national programming to make room for local channels and the cost to launch and operate a new spot beam satellite.[250] The Applicants contend that, despite future technological developments in spectrum efficiency that would enable the companies to increase satellite capacity (such as improved digital compression techniques), increased demands for satellite bandwidth (such as satellite must-carry requirements and HDTV carriage) will more than consume available satellite capacity.

76. With respect to the possibility of a joint venture in lieu of a merger. the Applicants disagree with the Opponents that such a venture could produce efficiencies comparable to a merger. The Applicants contend that, absent a merger, neither DirecTV nor EchoStar would be willing to give up control of its core satellite and spectrum resources. The Applicants note that standardization of equipment would require one of the two companies to replace its equipment, putting it at an economic disadvantage.[251] More specifically. the Applicants, contend that there are technical differences between the EchoStar and DirecTV system architectures that effectively preclude the implementation of any type of joint venture to share spectrum and orbital resources. The Applicants also contend that there are numerous operational **risks** and control-related difficulties associated with a joint venture, even if the technical difficulties could be overcome. The Applicants highlight piracy countermeasures and broadband deployment as two areas in which a joint venture would be unworkable because, they contend, the costs and complexities associated with such a venture would far exceed the benefits."' With respect to broadband deployment, the Applicants contend that a joint venture could not reach the five million customers that are needed for scale.'" The Applicants conclude that only a merger can create new DBS capacity and output, intensify competition with cable, and generate benefits for consumers.[254]

(...continued from previous page)
national programming. In contrast, the Applicanls arpue that the merger would realistically allow for the allocation of 16-19 frequencies out of a combined pool of 96 frequencies in order to provide coverage for all 210 **DMAs.** ***Id.***

[246] See EchoStar May 16 ***Ex Parre,,*** Auachment at 33.

[247] Applicants' Reply Comments at 7.

[248] *Id.* at 15-16.

[249] Applicants' Reply Comments, Willig Decl. at 10-11

[250] *Id.* at 10-11.

[251] Applicanls' Reply Comments at **30**

[252] Letter from Pantelis Michalopoulos, Esq. on behalf of EchoStar to Marlene Dortch, Secretary, FCC (July 11, 2002),(submitted **by** transmittal letter dated July 12, ***2002)*** at 1-2 ("Echostar July 11 *ex parte*").

[253] *Id.*, Attachment at 17.

[254] ***Id.***. Attachment at 19.

first spot beam satellite, DIRECTV 4-S, and had plans to launch a second spot-beam satellite, DIRECTV 7-S. It states that EchoStar also had pre-merger plans to build and launch two spot-beam satellites. ECHOSTAR 7 and 8, both to provide local-into-local TV broadcasting service. The State of Alaska claims that it is not clear that the merger will result in the claimed benefits to the residents of Alaska given that the Applicants propose to shift programming from satellites located at 119° W.L. to 101° W.L. According to the State of Alaska, it has been its experience that eastward shifts degrade service in some pans of Alaska and eliminates programming to other pans altogether.[239]

73. *Applicants' Response to Opponents' Claims.* In response, the Applicants claim that the proposed merger would achieve spectrum efficiencies necessary to facilitate the delivery of local programming to smaller markets that neither EchoStar nor DirecTV alone could serve. They claim that increased spectrum efficiencies would change the economics of providing local service by spreading the costs over a larger subscriber base, thus enabling New EchoStar to provide local programming service to these smaller markets that neither company alone could serve.[240] The Applicants also assen that the proposed merger would result in the provision of more reliable service. Such reliability, they claim, can be attributed to two primary factors – the increased redundancy associated with more in-orbit satellites that can deal with unexpected satellite failures, and the ability to use additional capacity, where available. to increase the amount of error correction applied to the DBS signal.'"

74. The Applicants argue that the technological solutions to the capacity problems proposed by the parties are technically and economically unrealistic. The Applicants claim that new compression techniques would result in only limited capacity efficiency gains with significant costs, including, but not limited to, replacing all current set-top boxes."' Similarly, the Applicants argue that the Opponents' call for the launching of high-capacity "super satellites" would entail significant costs, risks, and technical difficulties.'" The Applicants also dispute the Opponents' proposals for new modulation and video coding schemes to improve capacity. The Applicants claim that these schemes would result in signal interference and decreased service quality, and that they would require costly new set-top boxes. In addition, they claim that current and planned DBS satellites lack sufficient power to accommodate the adoption of these modulation schemes.[244] Finally, the Applicants contend that the Opponents' claims with regard to the Applicants' individual capabilities lo provide local programming fail lo take into account the need for future expansion of national programming and new or increased services – such as HDTV, new national networks, additional PPV, VOD, ITV, and educational television.[245]

[239] State of Alaska Comments at 10

[240] *See e.g.*, Applicants' Reply Comments at 19-24.

[241] *Id. 31* 11

[212] EchoSiar May 16 *Ex Parre* at 4, Attachment at 24-26. The Applicants argue that the merger's Parries have made unrealistic assumptions with regard io compressrun ratios, noting a 10:1 ratio is realistic in light of current technology and acceptable television picture quality. while the Parries' proposed 12:1 ratio could only be used under very limited circumstances at present and would certainly not be feasible to achieve the Parries' goals in a current DBS operational system. Applicants' Reply Comments, Barnett Decl. at 9-12.

[243] EchoStar May 16 *Ex Pane* at 4-5, Attachment at 29. EchoSrar contends that the proposed satellite designs are superficial, untested, and in error to the point of being infeasible. Applicanls' Reply Comments, Barnett Decl. at 1, X-9, 21-36.

[244] EchoStar May 16 *Ex Parre* at 4, Attachment at 22, 27-28; Applicanis' Reply Comments, Barnett Decl. at 13-16.

[245] Applicants' Reply Comments. Barnett Decl. at 2, 8. The Applicants argue that ihe allocation of 16 and 19 full-CONUS DBS frequencies to local programming as suggested by the Parties is unacceptable given DirecTV's total capacity of 46 frequenclcs and EchoStar's total capacity of 50 frequencies and future demand for expansion of

(continued....)

currently under construction by DirecTV and EchoStar could be modified for full local-into-local service at a cost of only $10-$20 million.[232]

69. NAB asserts that DirecTV and EchoStar each have ample capacity, using the techniques that one or both companies are already using. to offer all eligible TV stations in all local markets in the United States while continuing to deliver all of the national programming they currently deliver from their full-CONUS Ku-band slots. In addition, NAB claims that each company could further add substantial amounts of new national programming from those same slots. NAB claims that, using available techniques that apparently neither DirecTV nor EchoStar have yet exploited such as BPSK, the two firms could separately deliver still more programming using the CONUS frequencies.'"

70. Pegasus also contends that, regardless of the merger, efforts to expand local-into-local service and to develop new technology to maximize the efficient use of the spectrum will require substantial resources such as time and money.[234] For instance, Pegasus claims that making the spectrum efficiency benefits of the merger available to all subscribers. as proclaimed by the Applicants, would require that customers be provided with a dish and set-top boxes that are capable of receiving programming from all three DBS orbital slots. Funher, many of the alleged improvements that would result under the proposed merger would require modifications to existing set-top boxes, and New EchoSrar would need to integrate its customer base on a common platform because EchoStar and DirecTV use different compression standards. Pegasus also claims that many of New Echostar's customers would require new antennas for local-into-local service, depending on how the New EchoStar system is configured. Pegasus asserts that it is not clear that there are any additional upgrade cost efficiencies for a merged company because the costs and processes are essentially the same with or without a merger.[235]

71. NAB observes that EchoStar reported recently that it has already designed a set-top box that will enable its subscribers to receive DirecTV programming; the one remaining step is for DirecTV to download certain software by satellite to Echostar's set-top box.[236] Although the two systems use different encryption systems, NAB notes that EchoStar and DirecTV's Joint Engineering Statement indicates that the two companies are considering transmitting programming using "simulcryption." which – without the need for a uniform set-top box across all customers – would enable subscribers owning either set-top box to receive their existing programming. According to NAB, *a joint* venture could also employ this technique."'

72. NAB notes that the Applicants have failed to disclose how many markets each company individually could serve with its own satellite fleet, or proposed fleet. NAB contends that without further information on how many markets each company alone can serve with local-into-local programming, it is impossible to tell whether the local-into-local benefits are merger-specific. According to NAB, the Applicants have failed to disclose how many markets each company separately could serve with their own satellite fleets. or proposed fleets.[238] It notes that prior to the merger, DirecTV already launched its

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[232] *Id.*

[233] **NAB** Petition, Could Decl. at 18.

[234] Pegasus Petition, **Rusch** Aff. **at 13-14.**

[235] *Id.* at 14.

[236] NAB Petition. Could Decl. ai 15-16.

[237] *Id.* at 16.

[238] **NAB** Petition at 11-79.

of digital compression and claims that compression ratios significantly higher than 10:1 are now technically, economically, and operationally feasible. Specifically, NAB asserts that both DirecTV and EchoStar have stated that they expect compression ratios to be 12:1 with existing hardware.[224] Further, NAB observes that Harmonic, Inc., the manufacturer of the MPEG-2 encoders most widely used for DBS in the United States, now states that their current hardware. the "MV-SO," allows compression ratios of up to 14:1 with the same high quality and high availability of DBS systems in operation now.[225]

67. ***Other technical improvements.*** Pegasus *and* NAB also cite other technical improvements that could be made by DirecTV and Echostar. For instance, Pegasus notes that currently pay-per-view movies and theatrical events are transmitted on dedicated transponders. With new mass media storage devices, Pegasus claims that many of these productions could be downloaded in advance and released on demand by means of controlled access features. Pegasus suggests that, by equipping set-top boxes with technology that permits customers to capture programming and watch it on their own schedule, both DirecTV and EchoStar can avoid repetitive programming. thereby freeing up a substantial amount of spectrum without a merger.[226] NRTC additionally suggests that EchoStar could use Ka-band (18.35-18.8 GHz and 19.7-20.2 GHz) technology to provide local-into-local service. It notes that EchoStar is authorized to construct and launch satellites for two full-CONUS Ka-band orbits, and recently received authorization to acquire control of another unconstructed CONUS orbital Ka-band authorization.'" To the extent the capacity is not used for broadband, NRTC claims EchoStar can use *the* satellites to provide additional local-into-local service.[228] NAB states that either firm could use satellite dishes that receive signals from two or three different orbital locations, instead of a single location, allowing consumers to receive more programming.[229]

68. *Implementation.* Pegasus maintains that. using current design practices, EchoStar and DirecTV each could suppon full-CONUS local-into-local coverage of all 210 DMAs using a total of **16** frequency blocks divided between two satellites. while retaining their existing QPSK set-top boxes:.[230] Pegasus claims that one such system would use two satellites at two orbital positions, with each satellite having 29 spot beams carrying approximately one-half the local television signals, plus a CONUS-coverage antenna for national signals. Alternatively. Pegasus maintains that CONUS coverage could be provided by a third satellite, including one that is already in service. These satellites, according **to** Pegasus, would utilize only technology already launched or under construction by the Applicants, and only about one-third **of** each Applicant's total spectrum would be devoted to local-into-local service."' Pegasus contends that, if the merger proceeds, implementation of local-into-local service would require two or three years for design, construction. and launch of appropriate new satellites, at a cost of approximately $250 million each (satellite, launch vehicle, and insurance). In addition, Pegasus contends that there would be a need for four to six additional uplink eanh stations that would cost approximately $30 million in total capital costs. However, Pegasus maintains that some of the spot beam satellites

[224] **NAB** Petition, Could Decl. **at** 6.

[225] *Id.* at 7

[226] Pegasus Petition. Rusch Aff. at 12.

[227] *See* n.23, ***supra.***

[228] NRTC Petition at 59-60.

[229] **NAB** Petition at 84.

[210] Pegasus Petirion, Rusch **Aff. at 8.**

[231] ***id.***

spot-beam satellite in November 2001, and contends that this satellite re-uses frequencies an average of 7.33 times."[213] NAB notes that DirecTV has ordered another spot-beam satellite. which is scheduled to be launched in the second half of 2003, and also notes that EchoStar has ordered two spot beam DBS satellites.'"[214] NAB argues that frequency re-use factors of 10 or higher are practical,"[215] and thus. EchoStar and DirecTV each will be capable of providing local channels to a significant number of DMAs.[216]

65. Improved *modulation* ***techniques.*** NAB contends that with more robust modulation methods, such as 8PSK, at least a **30%** increase in capacity can be attained,"[217] yielding roughly 15-18 NTSC channels per transponder, **as** compared to 12-14 NTSC channels using standard methods of modulation and coding."[218] In addition, NAB claims that these numbers are likely to increase with future advances.?" NAB references "Turbo Trellis Coded Modulation" ("Turbo TCM") as an emerging technology that achieves improvements in efficiency by the combination of modulation and coding. According to NAB, improvements in decoding techniques and increases in processing capabilities speed have facilitated Turbo TCM, which achieves significantly higher data rates using the same bandwidth and power."[219] Pegasus also asserts that "turbo coding" could increase channel capacity or throughput. According to NAB, such coding is currently being used on some satellites services to improve the signal robustness by as much as a factor of two. which could double the effective channel capacity."[220]

66. *Improved* ***video*** compression. The merger Opponents argue that efficiency can be improved by using a higher compression ratio than the 10:1 ratio used predominantly today. Pegasus contends that compression algorithms have been improving along with the ongoing improvements in computational processing power and states that superb quality pictures **at** lower data rates can be expected in the near future as well as continued improvements going forward. without any changes to consumer equipment. Pegasus also asserts that the recently adopted "MPEG-4" standard can provide a reduction in data rates for the same program transmissions by a factor of two or three as compared to "MPEG-2." Pegasus notes that although use of MPEG-4 would require upgrade **of** transmission equipment and a new class of set-top boxes, those changes could be implemented incrementally.'"[221] Cablevision Systems Corporation, on behalf of Cablevision and R/L DBS Company. LLC ("Rainbow DBS") represents that it intends to use MPEG-4 for standard definition programming and MPEG-2 for high definition programming in its soon-to-be launched "Rainbow 1" DBS satellite."[222] NAB similarly notes the benefits

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[213] NAB Petition, Could Decl. at 3.

[214] *Id.*.

[215] *Id.* at 4-5.

[216] *Id.* **at** 8.

[217] *Id.* at 7. Mr. Could stales that, **as** compared **to** QPSK. 8PSK in principle permits a 50 percent Increase in data rate, but for analytical purposes assumes only **a** 30% increase would he achieved in actual practice.

[218] *Id.* at 7-8. Therefore, all other factors being equal, NAB asserts **that** the transponder channel capacity would increase to the same extent and will become 15-18 NTSC channels.

[219] *Id.* at 9.

[220] *Id.* at 13.

[221] Pegasus Petition. Rusch Aff. at **10.**

[222] *Id.* ai 11

[223] Letter from Howard I. Symons, Mintz Levin on behalf of Cablevision and R/L DBS Co. to Marlene H. Dortch, Secretary. FCC (Sept. 18, 2002) ("Cablevision Sept. 18 **ex** *parte*") at 7, 9. Rainbow DBS, a venture of Cablevision Systems Corporation ("Cablevision").is the licensee of 11 frequencies at 61.5 W.L., the easternmost of **U.S.** DBS orbital **slots. See** R/L ***DBS*** *Petition*, n.21, supra.

63. ***Opponenrs Challenges to Applicanrs'*** Claims ***of*** *Spectrum Efficiency.* Merger Opponents argue that spectrum efficiency claims put forth by the Applicants do not necessitate the consolidation of all the current U.S. allotted full-CONUS DBS frequencies. They claim that there is no evidence that spectrum scarcity has been a constraint on competition between EchoStar and DirecTV to the detriment of the public interest and that any claimed benefits that would result from combining all full-CONUS DBS spectrum could be achieved by less anti-competitive means. For instance. some Opponents propose that the individual companies could form a joint venture to share channel **uplinks** and downlinks, and bv using compatible set-top boxes, permit customers to receive programs from either company's satellites.[205] Opponents also argue that any claimed benefits that would result from the proposed merger could be achieved by each company alone without need of the merger.[206] Generally. the parties claim that each company alone has enough Ku-band CONUS capacity to offer local-into-local television broadcasting service to *100* markets. and possibly all 210 markets.[207] They generally argue that this can be accomplished through a variery of technical means such as (a) increased use of spot beam satellites, (b) improved modulation. (c) improved video compression techniques, and (d) other technical improvements.[208]

64. *Spot* beam *satellites.* Many Opponents assert that without the merger, both EchoStar and DirecTV are capable of providing local channels to a significant number of DMAs. In particular, NRTC states that assuming that the only satellites that will be used are those currently in orbit or on order and that current plans for use of spot beams will be implemented by the two companies. DirecTV would be able to provide local channels to approximarely 110 DMAs[209] and EchoStar would be able to provide local channels to approximately 80 DMAs.[210] Similarly. Pegasus suggests each company could serve 100 DMAs with their existing and planned spot beam satellites.[211] Pegasus claims that, with the use of DBS spot beam satellites, both companies individually are capable currently of providing local service to 100 DMAs, and ultimately either company could serve 150-210 DMAs while still providing national programming, PPV and other digital services to subscribers.[212] NAB notes that DirecTV launched its first

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[205] Duke Law Reply Comments at 16-17; NAB Pelition at 73: Pegasus Petition at 61; NRTC Petition at **63-64.** Because antitrust laws do not prohibit "competitors from forming joint ventures or other limited arrangements to develop, produce, or **market** new products," NAB claims the Applicant's claimed efficiencies could not be considered "merger specific" in any event. **NAB** Petition at XY-90.

[206] **See** *e.g.,* Duke Law Reply Comments at 18-22; NAB Petiiion at 76-82. Although most Opponents agree rhai the merger could eliminate duplicative programming.. they contend that consolidating channel delivery and eliminating duplicative programming could he achieved through less anticompetitive means.

[207] NAB Petition **at** 81: Pegasus Petiiion at 40-46; National Consumers League Comments at 2; NRTC Petition at 56-59.

[208] Pegasus Petition, Rusch **Aff.** At 4-11; NAB Petition at 84-89: Duke Law Comments at 22.

[209] NRTC Petition, Morgan Declaration at 2-4. NRTC asserts thai if DirecTV launches **just** one additional Satellite beyond those on order, with spot beam technology on only three frequencies. DirecTV will be able to serve a total **of** 187 DMAs, leaving only 23 unserved, NRTC suggests that the *23* unserved DMAs could be served by using spot-beam technology with additional frequencies, by rearranging the spot-beams, or by other means. **See** NRTC Petition. Morgan Decl. at 2-3

[210] NRTC Petition, Morgan Declaration at 2-4. NRTC asserts that **if** EchoStar launches **just** one additional satellite beyond those on order, *with* spot-beam *technology* on only three *frequencies, it will* **be** able *to Serve* a *total* of *160* DMAs. leaving only 50 DMAs unserved. NRTC suggests that the 50 unserved DMAs could be served by using spot-beam technology with additional frequencies. by rearranging the spot-beams, or by other means. NRTC Petition, Morgan Declaration at 2-3.

[211] Pegasus Petition, Rusch Aff. at 10.

[212] Pegasus Petition **at 44-46.**

and would allow New EchoStar to align the combined satellite fleet to the dictates of market efficiency.[197] Applicants claim that operational efficiencies will result from consolidating the two companies' duplicative ground station complexes, which are used to backhaul national and local programming, uplink that programming to satellites, and provide primary and backup telemetry, tacking and command for satellites.[198]

61. The Applicants also claim that the joint Satellite Application, which was filed subject to, and contingent upon, the grant of the Application, will also provide public interest benefits."[199] In the Satellite Application, the Applicanls jointly seek authority to operate a new spot beam direct broadcast satellite, "NEW ECHOSTAR 1," at the 110° **W.L.** using eight ***of*** the thirty-two **DBS** frequencies currently authorized separately to EchoStar and DirecTV."[200] The Applicants claim that the proposed "Local Channels, All Americans" plan, which will utilize the **NEW** ECHOSTAR 1 satellite in conjunction with the DIRECTV 4S, DIRECTV 7S, ECHOSTAR 7, and ECHOSTAR 8 satellites, will allow for operation of a total of 28 spot-beam frequencies. and thereby provide approximately 1,500 broadcast channels to the 210 DMAs with required back-up and service expansion capabilities."[201] Thus, Applicants claim that NEW ECHOSTAR 1, which would operate only **as** a result of Commission approval of the proposed merger and Satellite Application, will permit the combined company to fill local coverage gaps while maintaining existing national programming.

62. The Applicants additionally maintain that **if** the proposed merger is approved, New EchoStar would transition to a common set-top box platform. Currently, DirecTV and EchoStar use different transmission formats, which require different set-top boxes."[202] These boxes have different conditional access systems, transport streams, and descrambling structures. The Applicants claim that the transition to a common set-top box platform would enable the combined company to achieve substantial manufacturing efficiencies. lowering the overall research and development costs **as** well as the per-unit cost of building receivers for a larger subscriber base."[203] A common format set-top box would allow each subscriber to receive the maximum programming that New EchoStar's fleer of satellites and ground stations could offer. The Applicants assert that this common format set-top box would also foster a more level playing field with cable operator,. who have used common technology and have shared research and development costs for cable set-top boxes for some time. The Applicants claim that the transition to new set-top boxes would begin almost immediately after the merger, and the transition's duration would occur over a three-year period. The Applicants assert that an exchange program would he done as seamlessly as possible at no cost to existing subscribers. and that during the transition satellite signals would be simulcast or encrypted so that subscribers owning either existing set-top box platform could continue to receive programming.[204]

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[197] Application ai 36; Eng. Statement at 4-7.

[198] ***Id.*** at 7-8

[199] *See* Satellite Application, ***n.5,*** *supra.*

[200] *Id.* **ai** 8.

[201] *Id.* at *8,* 21. **See** *also* Applicants' Reply Comments at 4-5.

[202] Application, Eng. Statement at 2

[203] *Id.* at 4-7

[204] *Id.* **ai** 3. While the Applicants do not specify the duration of the transition, they note that the transition's goal is to quickly recover spectrum used in order to provide local programming to all 210 DMAs within 36 months of the merger's approval. As a result, all new customers following the merger's approval would receive "dual-speak" set-top boxes and satellite receiver dishes capable of receiving all DirecTV and EchoStar signals. EchoStar May 16 *Ex Parre* at 5-6, Attachment at 42.

1. Spectrum Efficiency

a. **Position of the** Parties

58. Applicants' Claims of Spectrum Efficiency. Generally, the Applicants claim that the efficiencies gained from the combination of spectrum resources of EchoStar and Hughes will provide numerous public interest benefits in the MVPD markets.[189] They contend that one of the most important benefits will be the increase in spectrum efficiency that would result from the elimination of duplicative use of DBS spectrum.[190] Specifically. the Applicants claim that approval of the proposed merger would allow for the elimination of over 500 duplicative local and national program channels. According to the Applicants, EchoStar provides 709 channels of video programming, while DirecTV offers 739 channels of video programming, 588 channels of which are duplicative.[191] Of these, EchoStar's Dish Network provides approximately *235* national programming channels, while DirecTV provides approximately I79 national programming channels, 150 of which are being duplicated by the companies.[192]

59. The Applicants contend that elimination of duplicative local broadcast and national programnung will allow the combined company to offer more niche national and local programming. expand offerings for HDTV programming, PPV, VOD, educational. specialty and foreign language programming, and offer other new and improved product offerings, including interactive services.[193] For example, the Applicants claim that currently, each company alone has only enough satellite capacity to offer two to three full-time HDTV channels. While technological advances may at best allow this capacity to double,[194] the Applicants claim that approval of the merger, which would make available newly-freed spectrum. would enable New EchoStar to offer at least 12 HDTV channels from one or more of its full-CONUS orbital locations.[195] In addition, the Applicants claim other benefits **will** result from the elimination of duplicative programming including the provision of significantly more new and diverse independent programming as well as more national programming networks and better quality DBS service to Americans living in rural areas, Alaska and Hawaii than could be achievable by each company operating independently.[196]

60. The Applicants also claim efficiencies will be realized from the ability of the two companies to combine their Satellite fleets. According to the Applicants, redeploying their combined satellite fleets would "significantly improve the utilization of the DBS spectrum and satellite resources." Through the use of spot beam satellites at all three full-CONUS locations, the Applicants assen that New EchoStar could provide approximately 540 national channels and 940 local channels. Thus, the Applicants contend that combination of the satellite fleets would eliminate the inefficiencies of splitting up the 32 DBS frequencies at the 110° W.L. and 119° W.L. orbital slots between EchoStar and DirecTV

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[189] ***See*** Section I.C.4. ***supra.***

[190] ***See*** Application ai 3-4, 27; Satellite Application at 3, 7-8.

[191] Letter from *Gary* M. *Epstein*, Counsel for DirecTV, and Pantelis Michalopoulos. Counsel for EchoStar. to Marlene H. Dortch. FCC. **dated May** 16, 2002 ("EchoStar May 16 ***Ex Parre")*** at 3. Attachment, "Technical Presentation: DBS Spectrum/ Capacity **Issues,"** at 17.

[192] Application, Eng. Statement at **9.**

[193] ***Id.*** at 8-10.

[194] *Id.* at 10. *See also* Applicants' Reply Comments, Attachment B, Barnett Decl. at 4.

[195] *Id.*

[196] Application at ***5.***

MVPDs following last year's D.C. Court of Appeals decision.[186] Thus, currently there are no outreach requirements. The issue of minority and female outreach, however, is under consideration in our pending EEO rulemaking, and any rules adopted in our EEO proceeding will apply to EchoStar and DirecTV irrespective of the outcome of their proposed merger.

55. ***Conclusion***. In summary, we do not find that approval of the proposed merger would inevitably lead to a loss of program diversity. Nor do we believe that approval of the proposed merger would stand at odds with our commitment to employment diversity. In contrast. we do find that the elimination of one nationwide DBS editor through this merger, without any cognizable evidence of offsetting enhancement of viewpoint diversity, would disserve the Commission's policy goal of viewpoint diversity. The potenrial harm that would result from this elimination must be weighed against any potential benefits of a combined entity. Thus, these conclusions will be included in the overall balancing of the potential public interest harms and benefits of the proposed merger.

C. Impact **of** the Transaction on Spectrum **Policy** and Rules

56. Our public interest analysis requires a broad consideration of another key component of federal communications policy – the deeply rooted preference for competitive processes and outcomes, as shaped by Congress and reflected in various specific Commission policies.[187] Our public interest analysis in this proceeding, then, must consider the impact that the proposed merger would have on implementation of Congress' pro-competitive, deregulatory policies aimed at developing and encouraging competitive markets, as well as the Commission's well-established policies intended to carry out these Congressional mandates. The proposed merger would result in New EchoStar acquiring control of 100 percent of the available U.S. allotted full-CONUS DBS orbital locations. In addition. New EchoStar would acquire control of approximately 39 percent of the Commission authorized GSO FSS Ka-band orbital locations, and approximately 33 percent of the Commission authorized orbital locations with operational satellites in the GSO FSS C- and Ku- bands.[188] The nature of this Application, thus requires that we consider the impact of the proposed merger on long-standing federal spectrum policies, which are designed to promote spectrum efficiency and encourage competition in the radio communications markets.

57. As discussed below, we find that the Applicants' claims of improved spectrum efficiency have some validity. The record indicates that Applicanrs would clearly realize a private benefit from eliminating duplicative carriage of programming channels and that alternative means of achieving comparable efficiencies appear to have significant operational and economic disadvantages. Nonetheless. the record does not support Applicants' assertions that these private efficiencies will result in cognizable public interest benefits under our merger review standard. We also find, based on the record before us, that grant of the proposed merger appears to be inconsistent with well-established federal pro-competitive spectrum policies.

[186] ***See Suspension of the Broadcast and Cable Equal Employment Outreach Program Requirements,*** 16 FCC Rcd 2872 (2001).

[187] ***See AT&T-TCI Order.*** n. 103, ***supra; MCI-EchoStar Order.*** n.18, ***supra.***

[188] Comhined. New EchoStar would hold 26 out of ***67*** Ka-band authorizations and 19 out of ***56*** C/Ku-band authorizations. **See** Appendix B,C, and D.

channel, but a third MVPD (DirecTV) elected to carry that channel.[177] The presence of DirecTV in the marker. in this instance, clearly affected the programming that was made available to several million households.

52. Our finding that the proposed merger of EchoStar and DirecTV would diminish viewpoint diversity is not inconsistent with the Commission's decision to deny "voice" status to DBS operators in the context of the TV-Radio rule. The TV-Radio proceeding answered a narrow question – whether DBS operators should be considered a "voice" for purposes of that rule. The Commission's answer in that context does not mean that DBS plays no role in promoting diversiry. In fact. the principal rationale for the Commission according cable a voice in the first place – that "most programming is either originated or selected by the cable system operator"[178] – is fully applicable to DBS operators. Moreover, while DBS operarors in 1999 were unable to retransmit local broadcast signals to their subscribers, they are able to do so today. Thus the factual underpinning of the Commission's original decision regarding DBS operators has changed. Consequently, for purposes of this merger application and on the facts before us, we find thar DBS operators play a role in promoting viewpoint diversity. The loss **of** the editorial function provided by one DBS operator diminishes viewpoint diversity by reducing the number of such editors available to American consumers.[179]

53. ***Employment diversip.*** The Cornmission has historically obligated broadcasters and other FCC-licensed media companies to comply with rules requiring equal employment opportunity ("EEO"). Those rules were applied to broadcasters in 1969,[180] cable operators in 1984,[181] and MVPDs (including DBS operators) in 1992.[182] After the D.C. Coun of Appeals struck down the EEO rules last year, the Commission initiated a proceeding to propose a new EEO rule consistent with the court's decision.'"[183] That Notice proposed rules prohibiting discrimination in hiring as well as an EEO outreach program. In so doing, the Commission explained that it "remain[s] committed to prohibiting discrimination in employment and requiring broad and inclusive outreach in recruirment" by broadcasters and MVPDs."[184]

54. CHC assens that the Commission should reject the merger application because, ***inter alia***, EchoStar today has inadequate representation of minorities in its executive ranks and has failed to commit rhe merged firm to "outreach within its executive and other senior-level ranks."[185] The Commission suspended enforcement of the outreach program requirements of the rules for both broadcasters and

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[177] ***Id.***

[178] *Local* ***Ownership Order,*** 14 FCC Rcd at 12953.

[179] The Commission'sdecision regarding the role of **DBS** operators in promoting viewpoint diversity is made on the information before **us.** It does not affect the validity of the "voice" component of the N-Radio rule or any other media ownership rule, nor does it prejudge future media ownership decisions. The Commission recently initiated a comprehensive proceeding aimed at measuring the impact ***of*** various media outlets, including **DBS,** on viewpoint diversity. ***See Biennial Review*** *NPRM.* n.141. ***supra.*** That proceeding will thoroughly address the weight appropriately accorded **DBS** operators in connection with the Commission's media ownership rules. For purposes of the instant license transfer application, we find that **DBS** operators contribute to viewpoint diversity.

[180] *Nondiscrimination in Employment* ***Practices,*** 18 FCC 2d 240 (1969)

[181] Cahle Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984)

[182] Cable Television and Consumer Protection and Competition **Act** of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1498 (1992).

[183] *See EEO NPRM,* n.158, *supra.*

[184] *Id.* at 22859.

[185] CHC Letter at 2.

number of radio and television stations one entity could own in a single market.[170] The ownership limit vanes depending on the number of media "voices" in a particular market. The Commission determined that television stations, radio stations, daily newspapers, and the incumbent cable operator in the market would each count as one voice for purposes of the TV-Radio Ownership rule.[171] The Commission declined, however, to count a DBS operator as a voice for purposes of the TV-Radio rule. The Commission explained that DBS operators did not appear to serve the same role in promoting diversity as cable operators because DBS operators did not carry local news and public affairs programming. due in pan to their inability, at the time of that decision. to retransmit local broadcast signals."' It appears the Commission also relied on cable operators' duty to carry public, educational, and governmental channels in reaching its decision regarding DBS operators and the voice test.[173]

50. For purposes of our review of the proposed transaction in this proceeding, however. we find that DBS operators do contribute to viewpoint diversity and that the loss of one such provider would diminish the diversity available to American consumers. In the area of media ownership policy, the Commission has long emphasized the imponance of market structures that promote viewpoint diversity. Where the Commission has not already adopted marker structure rules that incorporate diversity goals. the Commission must evaluate the impact of a proposed transaction on its diversity goals. Given that the Commission has not adopted market structure rules affirmatively aimed at promoting competition and diversity for DBS firms, proposed transactions involving DBS licenses must undergo case-by-case analysis to determine their impact on these policy goals."'

51. Courts have found that, by exercising their editorial discretion to select the programming channels carried on their distribution systems, both cable operators and DBS providers are engaged in speech entitled to First Amendment protection." This gatekeeper role clearly affects which entertainment and news programming that millions of Americans can view. The aggregation of the vast majority of current DBS channels by one such editor reduces the potential for different editors to deliver a variety of news and current affairs to Americans through the carriage of different news and public affairs channels. This development harms viewpoint diversity by reducing the number of MVPD editors in all markets. and leaving only one in some markets. The recent dispute between Cablevision and the Yankee Entertainment Sports ("YES") Network in New York illustrates this point with respect to sports and entertainment programming.[176] Two MVPDs (Cablevision and EchoSrar) decided not to carry the YES

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[170] *Review of the Commission's Regulations Governing* ***Television Broadcasting: Television Satellite Stations Review of Policy and Rules,*** *("Local* ***Ownership Order")*** 14 FCC Rcd 12903 (1999).

[171] *Id,* at 12953.

[172] *Id.*

[173] *Id.*

[174] ***2002 DBS Reporr and Order,*** n.16, ***supra.***

[115] ***Turner*** *Broadcasting System v F C C.,* 512 U S. at 636

[176] *See e.g.,* Bob Scherman, ***More*** *Thoughts on the* ***Road*** *to Monopoly*, SATELLITE BUSINESS **NEWS,** Vol. **14.** No. 9, May 8, *2002* at 6. The article highlights the YES Network dispute in New York as **a** good example of why a third provider in the MVPD market **is** essential. According to the article, the number of DBS service providers is the sole factor in determining how many alternatives consumers will have to their cable provider. As individual companies, EchoStar or DirecTV are the only "third choices" to the cable provider and it is this third choice "that affords consumers **a** modicum of protection against being victim to distributors who would become gatekeepers with more raw market power than ever before." *Id.* In the YES Network case, if the New York market had only one cable provider and one satellite service provider, both providers could have easily held out against the **YES** Network to the detriment of **a** large number **of** home-team New York Yankee viewers.

46. We also disagree with claims that the merger would contravene Congressional intent by reducing the number of DBS operators subject to the channel set-aside for non-commercial programming. The set-aside was established for the specific purpose of "assur[ing] public access to diverse sources of information."[164] Because Congress defined this obligation in percentage terms, there is no necessary connection between the number of DBS operators and the total number of channels set aside for non-commercial programming. The appropriate measure is the total number of channels operated by the universe of DBS firms. No evidence has been presented in this proceeding that the proposed merger would reduce the number of channels in use by the New EchoStar for non-commercial programming.

47. We also reject the claim by The Word Network that approval of the proposed merger would violate the 1992 Cable Act by allowing the merged firm potentially to deal it a death blow by excluding it from the DBS market. In suppon of its position, The Word Network cites language from a decision by the D.C. Circuit Court of Appeals in ***Time Warner*** *Entertainment* Co., *L.P.*. *v. FCC*.[165] The provision of the 1992 Cable Act that gave rise to the *Time* ***Warner*** decision, however. applies only to cable television operators, not DBS providers.[166] Further, The Word Network fails to explain how the possible denial of carriage by the New EchoStar would in fact deal it a "death blow" when it could reach consumers through other delivery systems. The Word Network's own comments state that its programming currently is carried on cable systems serving four million customers and on over-the-air television stations reaching six million homes.[167] In view of the availability of cable television systems and broadcast television stations to distribute The Word Network's programming – and considering their current use of those very platforms – its claim that the merger could deal it a death blow is not persuasive.

48. Finally, we disagree with Consumers Union's recommendation that this license transfer proceeding is the appropriate vehicle to restructure the public interest set-aside obligntions for the proposed New EchoStar. We established the current channel set-aside obligations. including the specific channel percentages, and the complaint process based on a well-developed record.[168] The conditions requested by Consumers Union raise issues that have application on an industry-wide basis.'" Accordingly, we find that the specific recommendations made by Consumers Union with respect to public interest set-aside issues are properly addressed in the rulemaking setting rather than a subset thereof in the context of a merger application.

49. *Viewpoint* ***diversip.*** Although the Commission has not directly addressed the issue of the impact of a DBS license transfer on viewpoint diversity, the Commission has considered the role of DBS operators as contributors to viewpoint diversity. In 1999, the Commission adopted a rule limiting the

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[164] Word Petition at **3**

[165] **240** F.3d 1126, 1132 (2001) ("the government must ensure [hat **a** programmer has at least two conduits through which it can reach the number of viewers needed for viability.")

[166] 47 U.S.C. § 533(f)(2)(A) (directing the FCC to establish limits on the number of subscribers any one cable system operator may serve).

[167] Word Petition at *2*

[168] ***See Implementation of Section 25 of rhe Cable Television Consumer Prorecrion ond Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations***, I3 FCC Rcd 23254 (1998).

[169] Consumers Union Comments at 20-21. For example, Consumers Union recommends that the Commission require New EchoStar to report on its contractual terms with programmers for the purpose of allowing the Commission to monitor New EchoStar's compliance with the public interest obligations. It would seem anomalous for the Commission to require such disclosure by New EchoSiar without requiring such disclosure by other DBS operators, particularly where the purpose would be to facilitate "benchmarking" of all DBS operators by the Commission.

certain ways. The Commission's rationale has been that the public would be exposed to wide variety of viewpoints if ownership of media outlets were diffused among more rather than fewer firms, a rationale that has been sustained in court.[154]

43. The ACA and Consumers Union contend that approval of the instant license transfer application would diminish viewpoint diversity by reducing the two "voices" of EchoStar and DirecTV to one.[155] In addition, the ACA asserts that the combined firm would have sufficient economic power to drive many small cable operators out of business, thereby eliminating another voice in the media market.

44. *Employment diversity.* The Commission has attempted to increase minority employment in broadcasters and MVPDs through its equal employment opportunity rules.[156] These rules were invalidated last year by the Court of Appeals for the District of Columbia.[157] In response to the court's decision. the Commission issued a Notice of Proposed Rulemaking last year proposing new EEO rules that would apply to DBS operators and other FCC-licensed media companies.[158] With regard to minority involvement in EchoStar, the CHC states that "EchoStar lacks sufficient minority representation and influence with no explicit practice *or* plan to outreach within its executive or other senior-level ranks."[159]

2. Discussion

45. *Program diversity.* Although the Commission has not directly addressed the impact of DBS license transfers on program diversity,[160] the Commission has found that, in some cases, more concentrated media market structures may promote the availability of diverse program fare than would a more diffused market structure.[161] For instance, the Commission has found that the ownership of two broadcast television networks by a single company may increase incentives for that company to serve more diverse audiences over its combined media outlets.[162] In this case. if the proposed merger were approved, Applicants have claimed that operational and spectrum efficiencies would enable New EchoStar to add channels with independent and diverse offerings.[163] The potential availability of such additional capacity, all else remaining equal. would therefore increase, not decrease, the likelihood that the merged company will offer a more diverse array of programming than either company would separately. Therefore, it is far from certain that approval of the proposed merger would, as some commenters argue, diminish program diversity.

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[154] See, *e.g.*, *F.C.C. v. N.C.C.B.*, 436 U.S. 775 (1978) (upholding the FCC's prohibition on the common ownership of broadcast stations and dally newspapers in the same market).

[155] ACA Petition at 7. Consumers Union Comments at 17-18.

[156] 47 C.F.R. §76.71(a)

[157] *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), *rehearing denied* 253 F.3d 732 (D.C. Cir. 2001), *cerr. denied,* 122 S.Ct. 920 (2002).

[158] *Review* of *the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies,* 16 FCC Rcd 22843 (2001)("*EEO NPRM*").

[159] CHC Letter ai 2.

[160] The Commission has previously ruled on transfer applications involving DBS licenses but none of those decisions addressed fhe impacf of the proposed transfer on program diversity. See, *e.g. USSB- DirecTV Order, Tempo-DirecTV Order,* n. 39-40, *supra.*

[161] *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule,* 16 FCC Rcd 1114, 11131 (2001).

[162] *Id.*

[163] Applicants' Reply Comments at 124.

Hispanic Caucus ("CHC"), similarly contends that EchoStar "has not committed itself to utilize its increased programming potential to provide content that targets ... specifically 35 million Americans of Latino descent."[147] The CHC asserts that approval of the proposed merger would harm program diversity because New EchoStar "has not made any commitment to ensure that local Latino broadcasters .. will be carried regardless of must-carry laws."[148]

40. Univision and The Word Network express concerns about EchoStar's prior practices and how those practices are likely to he reflected by New EchoStar, thus creating future difficulties for consumers, programmers and the Commission.[149] According to these parties, although both have obtained carriage on DirecTV, neither has been able to obtain carriage on the channels EchoStar has reserved for non-commercial educational programming.[150] Univision contends that approval of the proposed merger would allow one entity to exercise absolute monopoly control over the **flow** of programming, in particular to minority audiences, especially in areas where the minority population is insufficient to suppon any cable or broadcast. Univision claims that allowing one entity to exercise absolute monopoly control over the flow of programming to such vulnerable audiences would be an enormous public interest error.[151] The Word Network contends that a merger giving one **MVPD** such life-or-death power over a programmer would violate the Congressional goal expressed in the 1992 Cable Act that no single operator should be so large as to be capable of dealing a "death blow" to a programmer.[152]

41. Consumers Union states that if the Commission were to approve the proposed merger, the Commission must take additional actions to ensure preservation of its program diversity goals. In this respect. Consumers Union recommends that the Commission create a separate hoard that would select public interest programming for the public interest channels on New EchoStar. In addition, Consumers Union recommends that the Commission restructure the public interest set-aside obligations by increasing from four to seven percent the number of channels required to be set aside by New EchoStar for the carriage of public interest programming. Consumers Union also recommends that if the proposed merger is approved, the Commission require that contract terms between New EchoStar and public interest channels be reponed to the Commission."[153]

42. *Viewpoint diversity.* Another of the Commission's goals in the area of media policy is viewpoint diversity. To promote this goal, the Commission has restricted ownership of media outlets in

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[147] Letter from Congressional Hispanic Caucus to Chairman Michael Powell, FCC (June 6, 2002) (Letter signed by Rep. Nydia Velazquez, Rep. Jose Serrano, Rep. Grace Napolitano, Rep. Solomon Ortiz, Rep. Ed Pastor, Rep. Lucille Roybal-Allard, Rep. Robert Menendez, Rep. Ciro Rodriguez. Rep. Joe Baca, Rep. Luis Gutierrez, Rep. Charlie Gonzalez, Rep. Loretta Sanchez. Rep, Ruben Hinojosa, Rep. Anibal Acevedo-Vila. and Rep. Hilda Solis) ("CHC Letter").

[148] *Id.* at 2.

[149] Univision Petition at 12-14: Word Petition at 5-7. These parties set out various corrective actions that the Commission has taken with respect to EchoStar's practices.

[150] Univision Petition at 5, 7-11; Word Petition at 5-6. The 1992 Cable Act requires DBS providers lo allocate between four and seven percent of their channel capacity for "non-commercial programming or an educational or informational nature." 47 U.S.C. § 335(b)(1).

[151] Univision Petition at 16. For instance. Univision claims that geographically scattered Hispanic minority viewers have no other choice but to rely on DBS providers for access to Spanish-language programming especially in areas where broadcast or cable Spanish-language programming is not available.

[152] *Id.* at 6-7.

[153] Consumers Union Comments at 16-19

Moreover, one of the prime subjects of the alleged prior misconduct lies at the heart of the realization of the proffered public interest benefits claimed to flow from the merger – provision of additional local- into-local service pursuant to the must-carry rules. Accordingly, this history of past conduct will be taken into account in assessing the likelihood that potential beneficial conduct will occur in the absence of private economic incentives.

36. In summary, we find no reason on this record to conclude that Applicants' behavior to date precludes our find that the Applicant possesses the requisite "citizenship, character, financial. technical or other qualifications" to be a licensee. Accordingly we do not refer this issue to hearing.

B. Impact of the Transaction on Diversity

1. Background

37. As stated above, the Commission's public interest evaluation includes an evaluation of the proposed merger's affect on the quality and diversity of communications services to consumers.[141] In this respect, various parties have raised issues concerning the proposed merger's impact on program diversity, viewpoint diversity. and employment diversity. These issues are discussed below.

38. ***Program diversity.*** One of the Commission's goals in the area of media policy is program diversity, which refers to the availability of a variety of programming formats such as comedy. drama, and newsmagazines. as well as specific content categories such as health, business. food and content targeted to ethnic or racial groups."[142] The Applicants assen that the proposed merger would increase program diversity because operational and spectrum efficiencies that would result from combining the two separate companies would permit the merged firm to add channels and thus offer more independent and diverse programming."[143] Several Members of Congress suppon the Applicant's position on this issue.[144]

39. A number of parties, however, disagree that the proposed merger would promote the program diversity policies of the Commission. Consumers Union asserts that the proposed merger would reduce program diversity because it would reduce the number of DBS firms available for the Commission to "benchmark" regarding compliance with the DBS public interest set-aside obligations. Consumers Union claims that putting EchoStar, a company that has been clearly "recalcitrant" in complying with the public interest set-aside obligations, in charge of an even larger number of public interest channels, would clearly jeopardize the Commission's program diversity policies."[145] The National Council of LaRaza also asserts that the proposed merger would reduce program diversity and points to EchoStar's unwillingness to commit to carrying Latino-themed, English language programming post-merger.[146] The Congressional

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[141] *See* Section III, *supra*

[142] ***2002 Biennial Regulatory Review – Review, of rhe Commission's Broadcasr Ownership Rules and Other Rules Adopted Pursuant to Section 202 of rhe Telecommunications Acr of 1996. Cruss-Ownership of Broadcast Starions and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broodcasr Stations in Local Markets. Definition of Radio Markers,*** MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244, Notice of Proposed Rulemaking (***"Biennial Review NPRM"***) **FCC** 02-249 ¶ 38 (rel. Sept. 23. 2002)

[143] Applicants' Reply **Comments** at 124

[144] Letter from the Hon. Dick Armey, Majority Leader, U.S. House **of** Representatives (Apr. 16, 2002): Letter from **Hon. Charles F.** Bass. U.S. House of Representatives, to Chairman Michael Powell. **FCC** (May 28, 2002); Hon. Mike Doyle, U.S. House of Representatives, to Chairman Michael Powell, FCC (July 22, 2002).

[145] Consumers *Union* ***Comments*** at 16-19.

[146] LaRaza **Comments** at **9.**

resolving such issues."[137] Instead, Applicants point out that the proceedings that deal with these matters provide the appropriate forum for such complaints.

33. We conclude that none of the foregoing allegations provides a sufficient basis for finding that EchoStar lacks the fitness to acquire the licenses and authorizations currently held by Hughes/DirecTV. While certain past behavior by EchoStar has raised concern, we do not find such a patrem of conduct that would seriously erode our abiliry to trust EchoStar as a Commission licensee.[138] None of the matters cited by the Opponents has led to a finding that EchoStar fails to have the requisite "citizenship, character, financial, technical or other qualifications" to be a licensee. In addition, none of the allegations raised in this proceeding, whether considered singly or as a whole. provides a basis for finding that EchoStar lacks the fitness and requisite character to hold or acquire licenses and authorizations. Our processes remain available for rule violations that aggrieved parties may wish to raise in the future, and the Applicants may be subject to further enforcement actions, including forfeitures arising from any failure to comply with the statute or our rules. Outstanding allegations regarding rule violations are best handled in proceedings arising under the affected rule or policy because, in such proceedings, the Commission would have a complete record to review the relevant facts.[139] Similarly, un-adjudicated non-FCC violations, like those alleged by CWA, should be resolved by the governmental agency with proper jurisdiction.[140]

34. We recognize that some of the points raised by Opponents with respect to EchoStar's qualifications may be pertinent to our evaluation of the potential harms and benefits of the proposed transaction. For example, Applicants have made certain claims regarding prospective public Interest benefits from the merger, including the provision of local-into-local broadcast television service in all 210 markets. the ability to bring "true" broadband services to rural areas, as well as promises to remedy the merger's potential anticompetitive effects in areas not served by cable competitors with a "national pricing plan" that extends to both MVPD and broadband services. Applicants have also asserted that the swap-out of set-top boxes necessary for all current DBS subscribers to receive the combined service of the merged rntity will be free of charge to subscribers.

35. Realization of these claimed benefits, as well as the effective operation of the proffered national pricing "remedy," depends in large part on the likelihood that EchoStar has correctly predicted how New EchoStar will implement certain business strategies. EchoStar's record with respect to compliance with SHVIA's must-carry provisions and our rules suggests a resistance to taking steps to serve the public interest that do not also serve the company's view of its own private economic interest.

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[137] *id.* at 147

[138] *Compare, e.g., Applicarions of Leslie D. Brewer,* 17 FCC Rcd 2804, 2804 (2002) (licensee lacked character qualifications because he "had been broadcasting without a license . . . and was marketing and selling unauthorized FM broadcast transmitting equipment"); *Kevin David Mitnick,* 16 FCC Rcd 22740, 22740 (2002) (license applicant was "a convicted felon whose illegal activities have included the interception of electronic communications. computer fraud, wire fraud, and causing damage to computers"); ***Mario Loredo,*** 11 FCC Rcd 18010, 18010 (1996) (permit applican: misrepresented nationality).

[139] **See** *Applicarions* of *Ameritech Corp.. Transferor, arid SBC Communications Inc., Transferee. for* ***Consenr*** **to** *Transfer Control of Corporarions Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of rhe Communications Act* ***of*** *Parrs* **5,** *22, 24, 25. 63, 90, 95 and 101* 14 FCC Rcd 14712, 14949-50 (1999) (*"SBC-Ameritech Order"),* (quoting *SBC-SNET Order,* 13 FCC Rcd at 21306). In addition. Commission precedent often requires past FCC rule violations to be coupled with legitimate "evidence in the record to contravene the Applicants"' assertions that they are currently running their businesses in a "responsible matter" in order to raise a real character issue. *See SBC-SNET Order,* 13 FCC Rcd at 21306-07 (1998).

[140] *See* ***CWA*** **Petition** at 5

such programming to obtain additional equipment."' The Media Bureau addressed the matter, rejecting EchoStar's argument that its two-dish approach complied with SHVIA and the Commission's rules.[131] The Media Bureau required EchoStar to remedy the unlawful discrimination identified in the ***Second Dish Order*** as expeditiously as possible and also required the operator to file Compliance Reports on a periodic basis that describe both its plan and complete actions to bring its carriage of broadcast stations into compliance."' EchoStar has filed the requested Compliance Plans and its efforts are currently subject to evaluation in terms of the operator's present state of compliance with SHVIA and the Commission's must-carry rules."'

31. In addition, CWA alleges that the DISH Network "has refused to engage in serious collective bargaining" and raises other labor law concerns.[134] Finally, Pegasus alleges that EchoStar employees and/or its agents have used "false and misleading statements" about the proposed merger to deceive Pegasus subscribers into believing that they must switch to the Dish Network at this time.[135]

32. In response, the Applicants describe the foregoing issues as "private grievances" relating to "contractual or regulatory disputes, and the alleged quality of customer service."'[136] They maintain that the merger opponents have failed to demonstrate that this merger proceeding is the appropriate forum for

[130] Brunson Petition at 4-8 (complaining that EchoStar's two-dish policy violates must-carry obligations); Carolina Petiiion ai 5-4 (Echostar places a vast majority ot independent and niche stations on a second satellite, for which a second, uninstalled dish is needed for reception hy customers): Eagle Petition at 4-8 (complaining that EchoStar's two-dish policy violates must-carry obligations); Johnson Peiition ar 3-4 (complaining that EchoSrar has failed in its must-carry obligations and its two-dish policy unreasonably burdens carriage of local broadcasters); Pappas Comments at 1 I (Echostar relegated broadcasters to "wing slot" satellites that require special dishes to receive such stations and deterred customers from having the extra dish installed.); Paxson Petition at 6-7, 12-13 (EchoStar has openly defied its obligations to carry qualified television signals by refusing must carry demands on indefensible grounds and using two-dishes); Univision Petition at 9-16 (EchoStar has used secondary non-CONUS satellites that require an additional dish to transmit disfavored channels, including most Spanish language programming).

[131] ***See National Association of Broadcasters*** *and* ***Association of Local Television Stations;*** *Request* ***for Modification*** *or* ***Clarification*** *of* ***Broadcast Carriage*** *Rules for* ***Satellite Carriers.*** 17 FCC Rcd 6065 (Med. Bur. 2002) ***("Second Dish Order").*** Four Petitions for Reconsideration of that decision are pending. ***See*** Joint Petition for Partial Reconsideration or Clarification filed by Hardy. Carey & Chautin, LLP, LeSea Broadcasting Corp., Christina Television, Inc., and Carolina Christian Broadcasting (Apr. 18, 2002), Petition for Partial Reconsideration filed by Brunson Communications Inc. (May 3, 2002). Petition for Clarification or Partial Reconsideration filed by Maranatha Broadcasting Company, Inc. (May 6, 2002), and Pelition for Reconsideration, tiled by EchoStar Satellite Communications (May 6, 2002). In addition, three Applications for Review of the Bureau's decision by the full Commission are pending. *See* Applications for Review filed by WLNY-TV Inc. and Golden Orange Broadcasting Co. (May 3, 2002), Association of Public Television Starions and the Public Broadcasting Service (May 6, 2002). and Paxson Communications Corporation (May 6, 2002).

[132] *Second Dish* ***Order,*** 17 FCC Rcd at 6081.

[133] The question of whether EchoStar is presently in violation of ***SHVIA*** and the Commission's rules is subject to decision by the full Commission in the pending applications for review. See n.17. *supra.* The Commission will address the issue in that proceeding rather than in the instant Order. If the Commission determines on review that EchoStar is not in compliance with the statute or its rules, appropriate action will be taken.

[134] CWA Petirion at 4.

[135] ***See*** Letters from Patrick J. Grant, Counsel for Pegasus. to Marlene H. Dortch. Secretary. Federal Communications Commission (Aug. 27, 2002, Sept. 6, 2002. and Sept. 24, 2002) (providing examples of such practices and related correspondence between Pegasus and EchoStar). ***See also*** Letter from David R. Goodfriend. Director, Legal and Business Affairs. EchoStar (Sept. 12, 2002) (stating that EchoStar is investigating these allegations and that Pegasus is attempting to involve the Commission in a private commercial dispute).

[136] Applicants' Reply Comments at 146.

29. **A** number of Opponents raise concerns about EchoStar's past conduct in FCC proceedings and question whether it is qualified to be the "sole DBS gatekeeper."[122] In addition, several Opponents have alleged that EchoStar has failed to adhere to its must-carry obligations. Specifically. they claim that EchoStar, from at least *1998,* offered local-into-local stations absent agreement to do so, as a distributor tor PrimeTime 24, a satellite carrier, in violation of the Satellite Home Viewer Act of *1994* ("SHVA"), 17 U.S.C. § 119.[123] In a 1998 lawsuit against PrimeTime **24.** a United States district court found that PrimeTime had "simply ignored" the Commission's standard for retransmission and enjoined PrimeTime's retransmission of cenain stations.[124] Although PrimeTime 24 came into compliance with the court order, EchoStar and DirecTV simply terminated their contracts with PrimeTime *24* and allegedly continued to distribute local broadcast stations, claiming that they were not bound by **the** injunction."' DirecTV eventually came into compliance.[126] Paxson, however, alleges that EchoStar continues to provide illegal network signals."[127]

30. Numerous merger Opponentr and other commenters claim that EchoStar evaded its must-carry obligations under Satellite Home Viewer Improvement Act of *1999* ("SHVIA")[128] by delaying or refusing carriage on frivolous grounds, responding to carriage requests with form letters, or by demanding stations to make unreasonable demonstrations of their signal quality before carrying them.'" EchoStar also placed cenain local programming on non-CONUS satellites. requiring customers who wish to receive

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[122] Univision, Petition at 12-14; CWA Petition at 2-5; Northpoint Technology Petition at **12-14.** The Opponents cite instances where (i) the Commission described Echostar's argument to delay carriage of public interest programming as "disingenuous," *Petition for Waiver of DBS Public Inreresr Implementation,* 15 FCC Rcd 1814, 1817 (1999); (ii) the Cable Bureau admonished EchoStar lor failure io timely disclose that information it was treating as confidential had been publicly disclosed, thus failing in its "duty of candor" to the agency. *EchoSrar Satellite Corp. v. Young Broodcasring,* **16** FCC Rcd **15070** (Cable Bur. 2001): and (iii) the International Bureau justified imposing EchoStar the maximum allowable line for operating satellites from unauthorized orbital positions based on "the degree of misconduct, lack *of* voluntary disclosure and continuing violation." *EchoStar Satellite Corp.,* 13 FCC Rcd 16510 (Int'l Bur. 1998).

[123] *See also* Paxson Petition at *1* (citing **17** U.S.C. §§ 119, 325(b), and **47** C.F.R. § **76.64);** Primetime **24** Comments at **7-9.**

[124] *CBS, Inc. v. PrimeTime 24 Joint Venture,* 9 F. Supp.2d 1333. **1344** (S.D. Fla. 1998) ("PrimeTime **24** has simply ignored the grade B test. . . . This evidence demonstrates that PrimeTime **21 knew** of the governing legal standard. but nevertheless chose io circumvent it. Accordingly, the Magistrate Judge correctly rejected PrimeTime **24's** protests of 'good faith."').

[125] PrimeTime **24** Comments **at** 8-9.

[126] *CBS Broadcasting Inc. v. DirecTV,* No. 99-565-CIV-Nesbitt, *2000* WL **426396** (S.D.N.Y. Feb. **25,** 1999).

[127] Paxson Petition at 8.

[128] 47 U.S.C. § 338.

[129] Family Petition at **2-3** (complaining that EchoSiar disregarded its must-carry obligations by denial of carriage to local and public broadcasters); Johnson Petition ai **3-4** (alleging that Echostar's discriminatory implementation of its must-carry obligations); Telecasting Cornmenis at 4-5 (Echostar displays conduct that reflects a pattern of evading **its** carriage obligation. contravening SHVIA and the Commission's regulations by denying or impeding the rights of broadcasters to have their programming carried); Univision Petition at 8 (Echostar "cherrypick[s]" the local service and often refused to carry Spanish-language stations); Paxson Reply Cornmenis at 8 (expressing concern about Echostar's compliance with must-carry obligations); NPIT Reply Cornmenis at 1-2 (same); Satellite Receivers Reply Comments at 3 (same). The Commission criticized Echostar's carriage policy of requiring broadcasters "to prove signals." **See** *Implementation of rhe Satellite Home Viewer Improvement Acr of 1999: Broadcast Signal Carriage Issues,* **16** FCC Rcd **16544, 16572** (2001).

Clayton Act, which prohibits mergers that are likely to substantially lessen competition in any line of commerce."[113] The Commission, on the other hand, as stated above, is charged with determining whether the transfer of licenses serves the broader public interest. In the communications and video programming industries. competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players."[114] In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets.[115] We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors. and create opportunities to disadvantage rivals in anticompetitive ways.[116]

IV. COMPLIANCE WITH COMMUNICATIONS ACT AND COMMISSION RULES AND POLICIES

A. Licensing Qualifications

28. Section 310(d) of the Communications Act provides that no station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest. convenience and necessity will be served thereby."[117] Among the factors that the Commission considers in its public interest inquiry is whether the applicant for a license has the requisite "citizenship. character. financial, technical, and other qualifications."[118] The Commission has previously determined that, in deciding character issues, it will consider cenain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition.[119] With respect to FCC related conduct, the Commission has stated that violations of provisions of the Act, or of the Commission's rules or polices have a bearing on an applicant's character qualifications."[120] The Commission has used its character policy in the broadcast area as guidance in resolving similar questions in transfer of common carrier authorizations and other license transfer proceedings."[121]

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[113] 15 U.S.C. § 18

[114] *AT&T-MediaOne* **Order,** 15 FCC Rcd at 9821

[115] ***Id.***

[116] **See,** ***e.g.***., ***Applicarions for Consenr to the Transfer of Control lo Licenses and Section 214 Authorizations by Time Warner. Inc. and American Online. Inc. Transferee.*** 16 FCC Rcd 6547. 6553 (2001) (***"AOL-Time Warner Order"): Bell Atlantic-NYNEX Order.***

[117] 47 U.S.C. § 310(d)

[118] ***See*** *Applications* ***for Consenr to the Transfer of Control of Licenses and Secrion 214 Authorizations from Southern New England Telecommunications Corporarion. Transferor to SBC Communications. Inc.. Transferee.*** .13 FCC Rcd 21292,21305 (1998) (***"SBC-SNET Order"***).

[119] *Policy* ***Regarding Character Qualifications*** *in* ***Broadcasr Licensing,*** 102 FCC 2d 1179, 1209-10 (1986) (***"Character Qualifications Policy*** *Statement"), modified,* **5** FCC Rcd **3252** (1990), *recon. granted in parr,* 6 FCC Rcd 3448 (1991), ***modified in parr, 7*** FCC Rcd 6564 (1992) (collectively ***"Broadcast Licensing Character Qualifications").***

[120] *Character Qualifications Policy Statement,* 102 FCC 2d at 1208-9.

[121] ***See Broadcast Licensing Character Qualifications supra; MCI*** *Telecommunications* ***Corp.,*** 3 FCC Rcd 509.5 **15** n.14 (1988) (stating that character qualifications standards adopted in the broadcast contest can provide guidance in the common carrier context).

Applicants bear the burden of proving. by a preponderance of the evidence. that the proposed transaction. on balance. serves the public interest.'" If we are unable to find that the proposed transaction serves the public interest for any reason. or if the record presents a substantial and material question of fact. Section 309(e) of the Act requires thar we designate the application for hearing.[105]

26. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act.'"" which includes, among other things. preserving and enhancing cornpetition in relevant markets, ensuring that a diversity of voices is made available to the public. and accelerating private sector deployment of advanced services.[107] The Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: It has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[108] Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.[109] In conducting this analysis. the Commission may consider technological and market changes, and the nature. complexity, and speed of change of, as well as trends within, the communications industry.'[10]

27. In determining the competitive effects of the merger. our analysis is not limited by traditional antitrust principles."' The Commission and the Department of Justice ("DOJ") each have independent authority to examine communications mergers, but the standards governing the Commission's review differ from those of DOJ.[112] DOJ reviews mergers pursuant to Section 7 of the

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(...continued trom previous page)
***Assignmen of Licenses** in **Connection with the Proposed Joini Venture Between AT&T Corp. and British Telecommunications, plc**, 14 FCC Rcd 19410 (1999).*

[104] ***See. e.g., Applications for Consenr to rhe Transfer of Control** of **Licenses and Secrion 214 Authorizations Jroni Telecommunications, Inc.. Transferor to AT&T Corp.. Transferee**, 14 FCC Rcd 3160, 3168-70 (1999) ("AT&T-TCI **Order").***

[105] 47 U.S.C. § 309(e). Section 309(e)'s requirement applies only to those applications to which Title III of the Act applies, *i.e.*, radio station licenses. We are **not** required to designate lor hearing applications for the transfer or assignment of Title II authoriraiions when we are unable to find that the public interest would bc served by granting the applications, **see *ITT World Communications, Inc. v. FCC.*** 595 F.2d 897, 901 (2d Cir. 1979). but of course may do so if we find thar a hearing would be in **rhc** public interest.

[106] *Applicarions* ***for Consenr*** *ro* ***rhe Transfer of Conrrol*** *of* ***Licenses and Secrion 214 Authorizations Jrom MediaOne Group. Inc., Transferor, to AT&T Corp., Transferee,*** 15 FCC Rcd 9816, 9821 (2000) ***("AT&T-MediaOne Order"); AT&T-TCI Order,*** 14 FCC Rcd at 3168-69.

[107] ***See*** 47 U.S.C. §§ 157 nt, 254, 332(c)(7), Telecommunicntions Act of 1996, Preamble; ***AT&T-MediaOne Order,*** 15 FCC Rcd at 9821; ***cf.*** 47 U.S.C. §§ 521(4), 532(a).

[108] ***Turner Broadcasting System, Inc. v. FCC,*** 512 **U.S.** 622, 663 (1994) (quoting ***United States v. Midwest Video Corp.***, 406 **U.S.** 649, 668 n.27 (1972)).

[109] ***AT&T-MediaOne Order,*** 15 FCC Rcd at 9821.

[110] *Id.*

[111] ***See Satellite Business Systems,*** 62 F.C.C.2d 997, 1088 (1977) ***aff'd sub nom Unired States v. FCC,*** 652 F.2d 72 (DC Cir., 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

[112] ***AT&T-TCI Order,*** 14 FCC Rcd at 3168-69.